United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1074

To be argued by
MARC MARMARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1074

UNITED STATES OF AMERICA,

Appellee,

—v.—

HERMENEGILDO DIAZ-CABALLERO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Preliminary Statement

Hermenegildo Diaz-Caballero appeals from a judgment of conviction entered on October 15, 1975, after a two-day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 75 Cr. 706, filed on July 18, 1975 in four counts, charged defendants Hermenegildo Diaz-Caballero, a/k/a, "Puton", Efrain Maldonado and Rafael Gonzalez in Count One with conspiring to violate the Federal narcotics laws in violation of Title 21, United States Code, Section 846. Counts Two and Three charged Gonzalez with distributing and possessing with intent to distribute 24.84 and 36.66 grams of heroin on June 3, 1975 and June 23, 1975 respectively, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and (b)(1)(A). Count Four charged all three defendants with distributing

and possessing with intent to distribute 494.59 grams of heroin on July 8, 1975 in violation of those same sections.*

Trial on Indictment 75 Cr. 706 commenced on September 2, 1975, and concluded on September 3, 1975 when the jury found Diaz-Caballero guilty on Counts One and Four and acquitted Maldonado on the same counts.

On October 15, 1975, Judge MacMahon sentenced Diaz-Caballero to concurrent six-year terms of imprisonment and three years' special parole on each of Counts One and Four.

Diaz-Caballero is presently serving his sentence.

Statement of Facts

The Government's Case

On June 3, 1975, Detective Jose Luis Guzman of the New York City Police Department, acting in an undercover capacity, was introduced by an informant Rafael Gonzalez in the vicinity of 3rd Street, between Avenues B and C in Manhattan and there negotiated for the purchase of one ounce of heroin from Gonzalez for $1,850. Gonzalez left briefly to obtain the heroin and when he returned the transaction was completed. Gonzalez also gave Guzman a small sample of heroin. (Tr. 16-19; GX 1, 2).**

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* Gonzalez pleaded guilty to Count Four of Indictment 75 Cr. 706 on September 2, 1975. Counts One, Two and Three were dismissed upon Gonzalez' motion with the consent of the Government on October 15, 1975.

** References to pages of the trial transcript and to Government Exhibit are abbreviated herein as "Tr." and "GX", respectively.

Guzman and the informant met Gonzalez again on June 23, 1975, in the vicinity of 170 Avenue C in New York City. Gonzalez and Guzman negotiated for the sale of two ounces of heroin for $1,850 an ounce. Gonzalez told Guzman that they would have to go to the vicinity of 3rd Street where the first sale had been made. The two men drove to 3rd Street in Guzman's car. When they arrived Gonzalez left the car. Upon returning, Gonzalez told Guzman that his connection was not there and that they would have to go to 5th Street. Guzman testified that he understood the term connection to mean a source of supply or a supplier for an underling. Gonzalez then directed Guzman to the vicinity of 741 5th Street in Manhattan. Gonzalez left the car and entered a building at that address. When he returned he told Guzman that his connection was there, but that they would have to wait for his connection's wife to return with the keys to the apartment. Gonzalez returned to the apartment building. When he came back to the car, he told Guzman that he could only get an ounce and a half of heroin, but that Guzman could have the other half-ounce in a couple of days. Guzman paid Gonzalez $2,775 for the ounce and a half of heroin and left the area. (Tr. 19-22; GX 3).

Detective Guzman next met with Gonzalez on July 7, 1975 at an apartment located at 411 East 10th Street in Manhattan. At that time Gonzalez gave Guzman a small sample of heroin, telling him that it was what he had at that time. Guzman told Gonzalez that he wanted to purchase a large quantity of heroin. Gonzalez told him that he could get a nine and a half ounce package for $13,500 and Guzman agreed to purchase two such packages for $26,500. Gonzalez allowed Guzman to keep part of the sample he had given to him. Arrangements were made for Gonzalez to call Guzman the next day. (Tr. 22-25; GX 4).

On July 8, 1975, after two telephone calls from Gonzalez, Guzman and Detective Ralph Nieves met Gonzalez in the vicinity of 411 East 10th Street. Gonzalez parked behind the detectives' car and told Guzman he would leave to get the pound of heroin and would return driving a different car.

A short while later, Gonzalez returned with Diaz-Caballero, whom he referred to as "Puton" and introduced him to Guzman as his partner. At that time Diaz-Caballero asked Gonzalez whether he had counted the $26,000. When Gonzalez answered no, Diaz-Caballero directed Gonzalez to count the money immediately so that there would be no delays once the heroin was delivered. While Gonzalez entered the back seat of Guzman's car to count the money, Diaz-Caballero told Detective Nieves that he would keep an eye on the street.

After Gonzalez had finished counting the money, Diaz-Caballero told Guzman that the package would be delivered in ten minutes and would weigh more than a pound. Diaz-Caballero then asked Guzman where he did business, where he came from, how many times he was going to cut the heroin and how he was going to sell the heroin. Guzman responded that he wanted to buy the heroin and that the other matters were none of Diaz-Caballero's concern.

Diaz-Caballero and Gonzalez then left the area. During the next forty five minutes they returned several times driving either a Barracuda or a Monte Carlo. At these times, both Diaz-Caballero and Gonzalez assured Guzman that everything was all right and that the package would weigh more than a pound.

Thereafter, Gonzalez returned alone and told Guzman the sale would have to be completed on Houston Street

because he and Diaz-Caballero had seen the police on 10th Street. Guzman then followed Gonzalez to the vicinity of Houston Street and Avenue C. Gonzalez approached and told Guzman the package was located at a gas station on Houston Street and directed him to a Shell station.

Gonzalez and Guzman parked a short distance away from the Shell station and walked over. When they arrived, Guzman saw Diaz-Caballero standing by the trunk of the Monte Carlo. Diaz-Caballero asked Gonzalez where the money was. Gonzalez replied that it was in Guzman's car, after which Diaz-Caballero opened the trunk of the Monte Carlo. Gonzalez removed a brown paper bag and showed Guzman that there was a plastic bag inside containing a brown rock substance. Guzman asked both men if the package weighed a pound and they assured him it did. Diaz-Caballero then grabbed the package from Gonzalez, placed it back in the trunk and told Guzman that they could go someplace to weigh the package. Guzman replied he would accept their word as to the weight. Diaz-Caballero then reopened the trunk, and Gonzalez removed the package and walked back with Guzman to Guzman's car.

As Detectives Guzman and Nieves began counting the money, Diaz-Caballero and defendant Efrain Maldonado were placed under arrest and Gonzalez fled (Tr. 25-30, 31a-42, 71, 102, 104, 120; GX 5).*

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* Maldonado was observed by police authorities for the first time at the service station shortly before his arrest. After his arrest, Maldonado admitted that during the afternoon of July 8 he had met Diaz-Caballero and another individual whom he identified as Papo or Flaco and driven them in his car to pick up a package. Maldonado stated that when they arrived at their destination another individual placed a brown paper bag—which Maldonado assumed contained "drugs"—into the trunk of his car. Maldonado said he then drove his car to the Shell station on Houston Street (Tr. 125-26; GX 8).

The Defense Case

Diaz-Caballero rested at the conclusion of the Government's case. Maldonado offered into evidence an invoice from the Shell service station where the heroin was delivered (Defendant's Exhibit B) in an apparent effort to establish that he had had some legitimate reason to be present at the situs of the heroin transfer. Then he too rested.

ARGUMENT

POINT I

The evidence of the acts and statements of Gonzalez which predate July 8, 1975 was admissible against Diaz-Caballero without limitation. The trial court's instruction to the jury limiting their use of that evidence to the determination of the question of the conspiracy's existence gave to Diaz-Caballero more than he was entitled.

Diaz-Caballero contends that his conviction on the conspiracy charge "is based entirely on the hearsay testimony given by Detective Guzman concerning statements by Gonzalez" (Brief at 6), and further contends that since there was insufficient evidence independent of the hearsay to justify the use of the same against him, his conviction on Count One must fall. The contention is patently frivolous and premised on an utter distortion of the record. Although Diaz-Caballero chooses to ignore it, the plain fact is that Judge MacMahon specifically instructed the jury that the proof at trial failed to connect Diaz-Caballero with any of the narcotics activities antedating July 8, 1975 and that, accordingly, the jury was to consider the proof of those prior events, including the hearsay testimony now complained of, only in deter-

mining the question of whether a conspiracy existed and not as any evidence of Diaz-Caballero's membership in that conspiracy. Since there was abundant evidence, independent of any hearsay, that on July 8, 1975, at the latest, Diaz-Caballero joined Gonzalez in an existing conspiracy to distribute narcotics, evidence of Gonzalez' acts and declarations prior to July 8 in furtherance of the common objective of the conspiracy was, under the settled law of this and other Circuits, fully admissible against Diaz-Caballero without limitation. In this respect, Judge MacMahon's instructions to the jury were more favorable to defendants than the law required. Moreover, none of the defendants below objected to the admission in evidence of the hearsay statements about which Diaz-Caballero now complains and, accordingly, he has waived any such claim. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (en banc), *cert. denied*, 383 U.S. 907 (1966).*

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* Neither Diaz-Caballero nor Maldonado objected during the course of the testimony to any of the hearsay utterances about which Diaz-Caballero now complains. At the close of the Government's case, Diaz-Caballero moved to dismiss both counts of the Indictment with which he had been charged, on the ground that the Government had failed to prove a prima facie case. This motion was denied. (Tr. 139). Counsel for defendant Maldonado then made several motions, including a motion to exclude Government Exhibits One through Four, the heroin seized prior to July 8, 1975, on the ground that no connection to Maldonado had been shown (Tr. 144). This motion was joined in by Diaz-Caballero. (Tr. 145). It was only at this juncture that the court discussed the evidence of membership in the conspiracy by both defendants and it was only in the context of this discussion that Diaz-Caballero's counsel for the first time even obliquely objected to introduction of evidence against Diaz-Caballero relating to events prior to July 8, 1975. (Tr. 149). No objection was ever made to any evidence—including statements by Gonzalez—concerning the July 8, 1975 transaction. Since Diaz-Caballero failed to state his objection to the evidence as it was offered and received, this Court should refuse to consider the argument raised in Point I of Diaz-Cabellero's brief.

For purposes of analyzing Diaz-Caballero's somewhat confused argument, the evidence might usefully be separated into two parts—evidence relating to the heroin either sold or given as a sample to Detective Guzman on June 3, June 23 and July 7 and the evidence relating to the sale of a pound of heroin on July 8, 1975. Diaz-Caballero was an active participant in the July 8 transaction.

From the evidence of Gonzalez' pre-July 8 narcotics related activities, the jury could permissibly have found that Gonzalez, together with one or more others, was a member of a conspiracy to distribute narcotics. Indeed, from the evidence the jury could properly have inferred that Gonzalez had the same source of heroin for the first two heroin sales to Detective Guzman on June 3 and 23, respectively, and that he was dependent on that source. In connection with the first sale, for example, Gonzalez had to take leave of Detective Guzman to get the heroin. In connection with the second sale on June 23, Gonzalez told Detective Guzman that they had to go to the same locality, 3rd Street, where the first sale had taken place. (Tr. 21). When they arrived, Gonzalez said his "connection" was not there and directed Guzman to 5th Street. When Gonzalez finally did obtain from his connection's apartment the heroin promised, it was only an ounce and a half, instead of the agreed upon two ounces. (Tr. 20122).

Diaz-Caballero's own actions and declarations on July 8, 1975 amply established that on that date, at the very latest he joined with Gonzalez in an ongoing conspiracy to distribute heroin—again to the very same customer, Detective Guzman. On July 8, in Diaz-Caballero's presence, Gonzalez introduced him to Detective Guzman as his partner.

Immediately after Gonzalez' introduction, Diaz-Caballero directed Gonzalez to count the $26,000 tendered by Guzman so that there would be no delay once the heroin was delivered. (Tr. 27). Moreover, while the money was being counted by Gonzalez in the back seat of Guzman's car, Diaz-Caballero told Detective Nieves that he would keep an eye on the street. (Tr. 102). After the money had been counted, Diaz-Caballero—not Gonzalez—told Detective Guzman that the package would be delivered in ten minutes and that it would exceed a pound in weight. Diaz-Caballero then questioned Guzman about where he was from, how many times he was going to "cut" the heroin and where he was going to sell it. (Tr. 28, 71). After that both Gonzalez and Diaz-Caballero left, presumably to get the heroin. During the next three quarters of an hour, they returned and both men assured Guzman that the package was being readied and that it would weigh more than a pound. (Tr. 28, 29).

When thereafter Gonzalez and Guzman arrived at the Shell station, Diaz-Caballero was standing next to the trunk of the car containing the heroin. Diaz-Caballero asked Gonzalez where the money was, and then lifted open the trunk of the car whereupon Gonzalez removed the package. When Guzman questioned the weight of the package, Diaz-Caballero grabbed the heroin from Gonzalez and told Guzman that they could go somewhere to check the weight. After Guzman assured them that he would take their word, Diaz-Caballero reopened the trunk and Gonzalez again removed the heroin. (Tr. 29-30, 31A-33).

Given the foregoing, it is clear beyond doubt that the Government met its burden of establishing by a fair preponderance of the evidence independent of any of the hearsay utterances complained of that Diaz-Caballero became a member of the conspiracy charged no later than

July 8, 1975. See *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970).*

Since there was ample evidence that Diaz-Caballero joined with Gonzalez in an ongoing conspiracy by no later than July 8, 1975, the prior acts and declarations of Gonzalez in furtherance of the common objective—the distribution of narcotics—was properly admissible against Diaz-Caballero. It is settled law that a conspirator need not join in a conspiracy at its inception. However, each person joining a conspiracy is taken to adopt, and is bound by, the prior acts and statements made in furtherance of the common objective. *United States* v. *Sarno*, 456 F.2d 875, 878 (1st Cir. 1972); *Lowther* v. *United States*, 455 F.2d 657, 665 (10th Cir.), *cert. denied*, 409 U.S. 857, 409

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* While in one portion of his brief, Diaz-Caballero acknowledges that *Geaney* articulates the correct standard for determining the admissibility of a co-conspirator's hearsay declarations (Brief at 7), in his closing paragraph on this point he contends that the standard should be whether, absent the declarations of the co-conspirator, there is enough independent evidence to submit the conspiracy charge to the jury (Brief at 11). This latter standard was considered and expressly rejected by this Court recently when it reaffirmed the correctness of the *Geaney* formulation. *United States* v. *Wiley*, 519 F.2d 1348, 1350 (2d Cir. 1975) (*per curiam*); see *United States* v. *Gerry*, 515 F.2d 130, 141 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Miley*, 513 F.2d 1191, 1208 n. 12 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975). In any event, even assuming *arguendo* that the correct standard required a quantum of independent evidence sufficient to permit submission of the charge to the jury, the independent evidence of Diaz-Caballero's membership in the conspiracy set forth in the text amply met that burden. Indeed, the vast bulk of the evidence relating to the July 8 transaction was non-hearsay in nature; and there were but few statements made by Gonzalez out of Diaz-Caballero's presence during the entire afternoon of July 8 which were received in evidence. See Tr. 28-33, 102.

U.S. 887 (1972); *Langel* v. *United States*, 451 F.2d 957, 961 (8th Cir. 1971); *United States* v. *Montgomery*, 440 F.2d 694, 696 (9th Cir.) (per curiam), *cert. denied*, 404 U.S. 884 (1971); *United States* v. *McGowan*, 423 F.2d 413, 417 (4th Cir. 1970); *United States* v. *Knight*, 416 F.2d 1181, 1184 (9th Cir. 1969); *Nelson* v. *United States*, 415 F.2d 483, 486 (5th Cir. 1969); *United States* v. *Cerrito*, 413 F.2d 1270, 1272 (7th Cir. 1969), *cert. denied*, 396 U.S. 1004 (1970); *Lile* v. *United States*, 264 F.2d 278, 281 (9th Cir. 1958); *United States* v. *Sansone*, 231 F.2d 887, 893 (2d Cir.), *cert. denied*, 351 U.S. 987 (1956).

Diaz-Caballero, however, received a far more favorable charge from the court than he was entitled to on the basis of the record. Judge MacMahon charged the jury that the evidence relating to the transactions occurring prior to July 8 could be considered by the jury only in determining whether a conspiracy existed and could not be used to establish the participation therein of either Diaz-Caballero or Maldonado.*

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* Judge MacMahon charged:

"Now, if you find that a defendant did join the conspiracy with knowledge of its illegal purpose, then he is bound by what the others say and do afterward in furtherance of the objects of the conspiracy, even though he himself is not present, provided he is still a member of the conspiracy, because each conspirator is the agent or partner of every other conspirator. What one does to promote the illegal venture or plan binds every other member of the conspiracy. *Note, though, that a defendant, even if he joins the conspiracy, is not bound by the acts of conspirators which occurred before you, the jury find that he did joint* [*sic*] *the conspiracy.*

Here, for example, there are five exhibits in evidence of what the chemist would have told us, if he were here,

[Footnote continued on following page]

Prior to so charging the jury, the court asked defense counsel whether such an instruction would cure their belated "objections"—such as they were—and counsel for both defendants answered in the affirmative.* For this reason alone, Diaz-Caballero's current claim has been waived.

Furthermore, we respectfully submit that the evidence, taken as a whole, permitted the inference that Diaz-Caballero had been a member of the conspiracy from the

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and what the parties have stipulated the chemist would testify, were hroin, [sic] Exhibits 1 through 5. The evidence here, however, fails to connect these defendants with those earlier first four exhibits and the sales connected with them. You cannot find, on the basis of those first four, that these defendants joined in the conspiracy. That evidence cs to those first four transactions can only be considered by you in determining the question of whether a conspiracy existed, the first element.

On the question of whether these defendants joined the conspiracy, you can only consider Exhibit 5, the package involved in the July 8 transaction, as tending and bearing on the question of whether they did join the conspiracy." (Tr. 215-16) (emphasis added).

* After Diaz-Caballero's counsel had delivered his summation in which he argued, *inter alia*, that the Government had failed to establish Diaz-Caballero's connection with the earlier transactions (Tr. 175-177, 181), the following conference occurred at the side bar:

"The Court: I am going to instruct the jury that the Exhibits 1 through 4 can be considered by them only on the question of the existence of the conspiracy, and that they cannot consider that evidence on the question of whether either of these defendants joined the conspiracy.

Does that meet your point?

Mr. Schechter [Counsel for Maldonado]: Yes. Thank you.

Mr. Bernstein [Counsel for Diaz-Caballero]: Thank you.

The Court: All right." (Tr. 182).

moment of the earliest sale on June 3, 1975. That evidence permitted a finding that Gonzalez had the same source of heroin for the first two sales to Detective Guzman. Thus, on June 23, the date of the second sale, Gonzalez told Guzman that they would have to go to the place where the first sale had been made and when they arrived told him they would have to go to another location since his connection was not in the area. Gonzalez' July 8 statement to Detective Guzman that Diaz-Caballero was his partner, considered in the context of Guzman's prior dealings with Gonzalez (which included a transaction that had occurred just two weeks earlier), permitted the inference that Gonzalez was, in effect, telling Guzman that Diaz-Caballero was the source of the heroin Guzman had previously purchased. Compare *United States* v. *Tramunti*, 513 F.2d 1087, 1108 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975). That inference is strengthened by the evidence that in connection with the July 8 transaction, Diaz-Caballero directed and gave orders to Gonzalez. The jury could properly have inferred as well that since the earlier transactions involved significantly smaller amounts of heroin, Diaz-Caballero, as Gonzalez' supplier, had chosen to remain in the background and appear only on July 8 in connection with the larger transaction involving $26,500. While the jury would have been justified in finding that Diaz-Caballero was a member of the conspiracy from its inception, the court's charge effectively prevented it from so doing.

Finally, even if the evidence is viewed as establishing that the July 8 venture was a distinct and separate conspiracy from any earlier conspiratorial undertaking preceding July 8, compare *United States* v. *Sir Kue Chin*, Dkt. 75-1227 (2d Cir., April 21, 1976), and that Diaz-Caballero was a member only of the July 8 conspiracy, the evidence of Gonzalez' earlier activities was properly admitted against Diaz-Caballero to show "the way the

conspiracy [of which the latter was a member] came into being and its *modus operandi* when it operated", *United States* v. *Witt*, 215 F.2d 580, 583 (2d Cir.), *cert. denied, sub nom. Talanker* v. *United States*, 348 U.S. 887 (1954), and to define the nature of the conspiratorial agreement which Diaz-Caballero joined. *Id., accord, United States* v. *Hickey*, 360 F.2d 127 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966).

POINT II

The trial judge correctly refused to allow introduction of a self-serving hearsay statement made by Diaz-Caballero after his arrest.

Diaz-Caballero contends the trial court erred in not permitting him to adduce through a Government agent who was present at Diaz-Caballero's post-arrest interview that at that time Diaz-Caballero made certain exculpatory statements (Tr. 128-29). The contention is frivolous. The proffered testimony was nothing more than Diaz-Caballero's post-arrest self-serving hearsay declarations. As such the trial court's ruling to exclude was entirely correct.

The evidence of Diaz-Caballero's post-arrest exculpatory declarations was hearsay under Rule 801 of the Federal Rules of Evidence and as such inadmissible under Rule 802. Clearly, an exculpatory statement given by a criminal defendant shortly after his arrest has none of the indicia of reliability which are found in the various exceptions to the hearsay rule.* Indeed, such statements

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* Indeed, in discussing the rationale for receiving *admissions* in evidence, Weinstein notes that such statements are not admissible because they are made under circumstances which would foster reliability, but instead are received "because a party cannot object to his failure to cross-examine himself . . ." 4 *Weinstein's Evidence, United States Rules* (1975), ¶ 801(d)(2)[01] at 111-12.

are obviously self-serving. To allow the admission of such a statement would result in criminal defendants being permitted, in effect, to testify without fear of cross-examination. Neither the current rules nor prior decisional law permit any such thing.

The effect of the trial court's ruling was not to deny Diaz-Caballero an opportunity to offer an explanation * to the thrust of the Government's case, but merely the opportunity to do so by way of a self-serving hearsay statement.

Equally inapplicable is Diaz-Caballero's reliance on *Water* v. *Kings County Trust Company*, 144 F.2d 680, 682 (2d Cir.), *cert. denied*, 323 U.S. 769 (1944). That case held that where a portion of a written instrument containing admissions has been received into evidence the adverse party may introduce the remainder of the writing to explain or qualify the admission.** Since the Government offered no portion of any oral, much less written, statement of Diaz-Caballero into evidence, this doctrine is clearly inapplicable.

Diaz-Caballero's reliance on Rule 806 of the Federal Rules of Evidence is also misplaced. That rule, by its

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* *See* I Wigmore, Evidence (3d ed. 1940) § 34 at 423-25 for a statement of the law of explanation.

** Wigmore explains this doctrine as follows:

> "Ex. 5. The rest of a conversation or writing, of which a part has been received as an admission, may be presented by the opponent to explain away the apparent effect of the fragment: thus to adopt Algernon Sidney's famous illustration . . ., the prosecution, on a charge of blasphemy, might offer a statement of the defendant: 'There is no God'; but this could instantly be explained away as part of the quotation from the Bible of the passage, 'The fool hath said in his heart, 'There is no God'. Such is the complementary process of Explanation, by the opponent, as suggested by and related to the evidentiary fact received from the proponent." (*Id.* at 424) (footnote omitted).

terms, allows the credibility of a declarant whose hearsay has been admitted into evidence to be attacked or supported. Examples of this would be impeachment by inconsistent statements or impeachment in the manner provided in Rules 607 and 608. Diaz-Caballero has offered no authority which would even hint that Rule 806 should be stretched to allow the introduction of self-serving hearsay statements which do not, either directly or indirectly, bear on the credibility of Gonzalez, the only declarant aside from Diaz-Caballero whose statements were introduced into evidence.

This contention is plainly frivolous. The court was clearly justified in refusing to admit the hearsay evidence.

CONCLUSION

The judgment of conviction should be affirmed.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

MARC MARMARO being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 3rd day of MAY, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

CARL D. BERNSTEIN, Esq.
Messrs. KRONEN & BERNSTEIN
485 Madison Ave.
New York, N.Y. 10022

And deponent further says that he sealed the said envelope and placed the same in the mail ~~chute drop for mailing at One St. Andrew's Plaza~~, Borough of Manhattan, City of New York. box outside the U.S. Courthouse, Foley Square

Marc Marmaro
MARC MARMARO

Sworn to before me this
3rd day of MAY, 1976

Maria A. Morales

MARIA A. MORALES
NOTARY PUBLIC, State of New York
No. 31 - 4521851
Qualified in New York County
Term Expires March 30, 1978